No. 12,438

IN THE

United States Court of Appeals

For the Ninth Circuit

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO, Executor of the Last Will and Testament of Sanford Plummer, Deceased; CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO, Executor of the Last Will and Testament of Caroline Alice Plummer, Deceased, as an individual and distributee; CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO, as trustee and distributee of the Estate of Sanford Plummer, Deceased,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' REPLY BRIEF.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Table of Authorities Cited

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APPELLANTS' REPLY BRIEF.

On reading the reply brief of appellee, it became evident that the only question at issue is the legal effect of the provision of the will of the decedent that all of his property was community property of him-

self and wife, as of the date of its declaration, viz.: the date of the execution of the Will, September 17, 1939.

Bear in mind that, under the authorities cited, not by us alone but by counsel for appellee in their brief, the decedent had an absolute right at any time after July 29, 1927, to convert all of his property, whether separate, community or otherwise, into community property of post-1927 type, provided he used apt language in doing so. Bearing that in mind, any and all references to the various statements of *fact,* made in the affidavit of Scott Dunham, and in the statement of *facts* submitted to the Honorable Judge of the District Court, or in the statement of *facts* on this appeal, are entirely beside the point.

Let us assume, for the sake of the argument, that all of these *facts,* as so stated, are true. Nevertheless, the husband, with the consent of his wife, express or presumed, still retained the right, under the law of California, at any time to change the status of his property, no matter what it might have been, to that of community property of the post-1927 type. If the law of California, as cited by both the parties hereto, means anything at all, it means that he had that right, provided only he followed the procedure and the language, oral or written, sufficient so as to express his intent as set up by the law of California.

We submit the following short resume of the language of the Appellate Courts of California in ex-

pressing the rule of law in this State, which must be followed.

In *Estate of Watkins,* 16 Cal. (2d) 793, we find this language at page 797:

> "It is well settled that a husband and wife may agree with respect to the character of the property which they hold and that they may transmute their property from one status to another by an agreement which ordinarily need not be executed with any particular formality", citing eight California cases.

Again in the same case (p. 797):

> "A single written instrument may constitute both a will and a contract. (Security First Natl. Bank v. Stack, 32 Cal. App. (2d) 586 (90 Pac. (2d) 337); Norton v. Norton, 41 Cal. App. 614 (183 Pac. 214) and we believe that the declarations contained in the joint and mutual will must be held to have constituted an agreement between the spouses, fixing the status of their property as community property."

Then, note the language in this same case, at page 798, where the Court refers to the case of *Security First National Bank v. Stack,* 32 Cal. App. (2d) 586:

> "The Court there held that the declaration in the will and the wife's consent thereto terminated the joint tenancies and fixed the character of the property as community property."

Again, in *Estate of Jameson,* 93 A.C.A. 73, 80, note the following language:

> "A declaration therein (namely, companion wills) with respect to the community character of the property would tend to prove an agreement between them that they intended it to be so classified."

In *Norton v. Estate of Norton,* 41 Cal.App. 614, at page 619, we find the following language:

> "A writing may be both a will and a contract. For the purposes of the present appeal, it is immaterial whether it is operative for testamentary purposes or not. It is executed with all of the formalities required in the execution of a contract and a suit may be maintained upon it, without regard to its testamentary character."

And, finally, in the case of *Bank of America v. Rogan,* 33 Fed. Supp. 183, may we call attention to the language of the written agreement between the spouses, to be found in XIV Southern California Law Review at pages 407 and 408. The agreement is dated February 15, 1932 and contains the following language in part:

> "Said Parker M. Lewis is possessed of certain property which is, in fact, owned and held by him as his sole and separate estate * * * It is agreed * * * that all that certain property * * * is hereby declared to be owned and held by these parties in community in the same manner and to the same effect as if acquired by the parties hereto during coverture from the joint earnings of these parties, as contemplated in Section 687 Civil Code of California."

Note, also, paragraph V of the findings (p. 407), that Parker M. Lewis and Elizabeth Lewis were married in the State of California on the 26th day of January, 1925, two years and a half before Section 161a became effective on July 29, 1927.

Note, also, the language of paragraph XIII of the findings (p. 411):

> "It is not true that the interests therein of decedent's wife at the time of his death were valueless and insofar as the ownership, possession and enjoyment by the wife of a one-half interest in said community property is concerned, it is immaterial whether the same was acquired before or after July 29, 1927."

And again in finding XXIII (p. 414):

> "It is true that *prior* to decedent's death, Elizabeth Lewis became the *absolute owner* of an undivided one-half interest in said property with equal rights of possession and enjoyment of the whole thereof."

We submit, therefore, that the only difference between the *Bank of America v. Rogan* case and the instant case is that in the former case, the agreement is in a separate document, signed by both husband and wife, and in the instant case the agreement is contained in the will of the decedent, confirmed by the provisions of the decree of final distribution of decedent's estate by the Superior Court in and for the County of Alameda. (T. 8, 9.) In neither of the cases is there any attempt made to refer to any dis-

tinction between so-called pre-1927 type and post-1927 type of community property. Yet, in the decision in the *Rogan* case, notwithstanding the absence of any such express declaration, the Court held that the wife acquired "an ownership of her own, definite enough to warrant its exclusion from the husband's estate." (Page 189.)

Again, in *Security First National Bank v. Stack,* 32 Cal. App. (2d) 586, the Court said, page 592:

> "The *will* was effective as of the date of death; the *agreement* was effective from the date of its execution."

And finally, we again direct the Court's attention to *Herman v. Mortenson,* 72 Cal. App. (2d) 413, and the citations therein of many cases from the Appellate Courts of California, categorically upholding the instruction of the lower Court to the jury that "The law presumes that the grantee has accepted the grant or gift even though he has no knowledge of it or there is no express consent to such gift where such gift would be beneficial to such grantee." (p. 418.) (Appellants' brief, 12 and 13.)

In our opening brief (pages 12 and 13) we quoted at length from the case of *Herman v. Mortenson,* supra, because the rule laid down therein and the principle of law therein declared have a direct bearing upon the single issue of law before this Court in this case. Yet, eminent counsel for appellee have not deigned to refer to the case, either directly or indirectly. Is the principle of law therein enunciated and its applicability to the lone issue of law in this case

to be so easily brushed off as not worth even passing attention? Yet, counsel dwell upon the fact that the consent of the surviving wife does not *expressly* appear, either orally or in writing.

But the status of her interest in the community property, so declared, was and is absolutely unconditional; there were no burdens attached thereto; and under the rule declared in said case, *Herman v. Mortenson*, such an *express* consent was not necessary. It will be conclusively presumed unless negatived by evidence to the contrary. If the declaration means anything at all, it means that the husband gave to his wife a present, vested and equal interest in their community property, just as effectively as though the wife's acceptance of such a declaration, made for her benefit, was expressed in writing, as in the case of *Bank of America v. Rogan,* supra. Otherwise, the said declaration was nothing but an empty gesture.

But an empty and idle gesture is hardly conceivable in the execution of a will. The making of one's will is a most solemn act and seriously considered, and from which all such things as idle and empty gestures are barred.

As this reply brief was being written, there came to our attention the recent (March 13, 1950) decision in the case of *Chase v. Leiter,* 96 A.C.A. 468. In that case, a husband and wife made a joint and mutual will, declaring that, although some of their property was held in joint tenancies, all of their property was community property. The will left the property to

certain trustees, and after the husband's death the wife asserted a claim as surviving joint tenant.

The District Court of Appeal, citing with approval *Estate of Watkins,* supra, said (p. 478):

> "The will was a contract which became effective as soon as executed." (p. 478.)

And, quoting from Annual Survey of California Law (p. 110), stated:

> "The cases of the last year (1948-49) continue to reflect the view * * * that agreements or understandings entered into during marriage as to property acquired or to be acquired may be * * * effective to constitute it community property." (p. 479.)

Counsel for appellee contend that Paragraph Second of the decedent's will reflects no intention to convert "old type" community property into "new type." In support of this, they advance an alternative that the conversation concerning community property between the decedent and his accountant, Scott Dunham, occurred either before or after September 17, 1939, the date of the execution of the will; and they conclude that it is unlikely that the conversation took place after September 17, 1939. (Br. 18.) This conclusion is based upon the erroneous premise set forth by counsel for appellee, to-wit, that Scott Dunham and the firm of John F. Forbes and Company were employed to prepare decedent's income tax returns for the years *1938* and *1939.* The fact is, however, that these accountants were engaged to prepare his income tax returns for *1939* and *1940* (R. 14), and not for

1938. Prior to the preparation of his 1939 return, he had had another tax adviser. (R. 15.) The conversation concerning the types of community property between Sanford Plummer and Scott Dunham must therefore, in the nature of things, have occurred between December 31, 1939 and March 15, 1940.

We shall therefore answer the argument of counsel based upon the alternative that the conversation was had after the execution of the will. Counsel say (Br. 18) that if the conversation occurred after the execution of the will on September 17, 1939, it is apparent that the decedent did not think that he had already converted the "old type" community property into "new type". Counsel for the appellee point out, in support of this contention, that the deceased instructed Dunham to report 20 per cent of his income as community income, but counsel neglect to mention that this was done by the decedent only to avoid further controversies or arguments with the Treasury Department. (R. 15.) Therefore, no significance should be attached to the fact that the 1939 and 1940 returns reported only 20% of the income as being from property in which the wife had a vested interest; and this for the reason that the decedent was willing to pay the tax rather than to argue against it.

In view of the determined stand taken by the Commissioner in the case at bar, it is morally certain that if Sanford Plummer, in his income tax returns filed in March, 1940 and March, 1941, had returned all of his income as post-1927 type, he would have been met

with a barrage of objections, which, as appears from Dunham's affidavit, the deceased wished to avoid.

The appellee also contends that, assuming that Paragraph Second of the will indicates an intention to convert "old type" into "new type" community property, the paragraph was legally insufficient for that purpose, because, as appellee contends, such a conversion can be accomplished only by agreements and mutual consent of the parties, and Paragraph Second could not constitute an agreement between decedent and his wife, when she had no knowledge of the paragraph. (Br. 19, note 4.)

In this position, appellee overlooks entirely the presumption of assent to a beneficial grant, which presumption supplies the consent of the wife.

We feel that we have answered, and we hope convincingly, all of the arguments of counsel for appellee. We have endeavored to support our construction of the legal effect of the declaration of decedent in Paragraph Second of his will by applicable decisions of the Appellate Courts of California and the case of *Bank of America v. Rogan,* supra, decided in the United States District Court for the Southern District of California.

Dated, San Francisco, California,
March 31, 1950.

Respectfully submitted,
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GEORGE DEVINE,
Attorneys for Appellants.